



sovereignty over all of the natural resources in the IRW, the State lacked standing to prosecute this action. The State responded demonstrating that it has standing to prosecute this action, and that the Cherokee Nation is not a necessary party. DKT #1822. Defendants replied on January 20, 2009. DKT #1825.

On May 20, 2009, the State filed with the Court a copy of an agreement made the day before by the Cherokee Nation assigning to the State all of its rights to sue the Defendants "to the extent of its interests in the lands, water, and other natural resources in the Illinois River (including any regulatory authority incident thereto)," without definitively determining what those interests were. *See* DKT #2108 & 2108-2. In bringing the fact of this assignment to the Court's attention the State made no argument, but simply stated that the "document relates to issues raised" in Defendants' Rule 19 Motion, DKT #1788 & 1790. The assignment by the Cherokee Nation to the State is a fact which may be of some consequence in consideration of Defendants' Rule 19 motion, and the State correctly brought it to the Court's attention. In previous instances, the parties to this case have brought factual matters and legal developments to the Court's attention by documents called "notice" or "advice."<sup>1</sup>

## **II. Argument**

### **A. The State's Notice is not a supplemental brief**

Defendants claim that the filing of this Notice and its attached assignment violates the Federal Rules of Civil Procedure and should be stricken. *See* Motion, p. 1. However, Defendants cite no Federal Rule of Civil Procedure which has been violated, let alone one which

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<sup>1</sup> *See, e.g.* DKT # 1165, 1169, 1170, & 1181 (Defendants' various notices of supplemental legal authority); DKT # 1390 (Advice of Cargill Defendants that they are members of the joint defense group in this action); DKT 1427 (Defendants' Notice of Advice that no stipulation reached on standing issue); DKT # 1703 (Advice of Cargill Defendants that small portion of poultry litter generated in the IRW was land applied or composted on farms).

requires striking the State's notice and copy of the assignment. Instead, Defendants cite two cases in which sur-reply briefs were forbidden because such filings were not provided for in the local court rules or because they were filed without consent of the opposing party. *See Southern Star Central Gas Pipeline, Inc. v. Greuel*, 2009 U.S. Dist. LEXIS 36677, at \*14, n. 4 (D. Kan. April 30, 2009); *E.T.I. Euro Telecom Int'l N.V. v. Republic of Bolivia*, 2008 U.S. Dist. LEXIS 67217, at \* 1-2 (S.D.N.Y. Sept. 4, 2008). Neither case supports striking the State's Notice to the Court, with its attached copy of the Cherokee Nation assignment.

While the Court's Local Civil Rule 7.2(h) states that "supplemental briefs" are not encouraged, and may only be filed with leave of Court, and, when allowed, will be limited to ten pages, the State's notice is not a brief. It is merely an advice to the Court and the parties of the fact that the Cherokee Nation has made the assignment which is attached. It identifies the motion to which it relates, and, unlike a brief, makes no argument whatsoever.

The assignment from the Cherokee Nation to the State is an operative fact, of which the Court is required to be informed. The State simply advised the Court of the fact, without elaboration or argument. The Notice could not have been filed within the briefing cycle, because the assignment was not made until May 19, 2009, the day before it was filed. However, should the Court determine leave was needed to bring the assignment to the Court's attention, the State respectfully asks leave to do so. The Court should not decline to take notice of the operative fact of the assignment by striking it from the Court's consideration.

**B. The State will provide supplemental briefing desired by the Court**

Defendants on May 21, 2009 have already filed a brief (without leave of court) regarding the subject assignment. Defendants called that brief a "Counter-Notice on the 'State of Oklahoma's Notice of Filing of Document' [DKT # 2108]." DKT # 2110. That "Counter-

Notice" correctly notes that the State had not fully explained to the Court the legal implications of various provisions contained in the assignment (because unlike Defendants in their "Counter-Notice" the State made no argument whatsoever in its Notice). *Id.*, p. 1. The "Counter-Notice" went on to assert the State had made certain concessions (which it did not) and made legal arguments about the Cherokee Nation assignment. These arguments distinguish Defendants' "Counter-Notice" as a brief, rather than a mere advice of fact, which was the substance and effect of the State's notice. On May 22, 2009 the Court entered a minute order that any further briefing related to Docket # 1788 and 1790 would be stricken unless filed after application is filed and leave granted by the Court. DKT #2111. The Court neither struck the State's Notice (DKT # 2108) nor otherwise commented on it.

Defendants' Motion argues the benefits of supplemental briefs which may be helpful to the Court. *See* Motion, p. 2. If additional briefing *is* helpful to the Court, the State stands ready to assist and to respond to the substance of Defendants' proposed brief, DKT #2244-2. However the setting of the underlying motions, Docket Nos. #1788 & 1790, for argument on July 2, 2009, within the normal response time for Defendants' Motion, makes a full and fair response to that Motion impossible before argument. Therefore, the State will appear on July 2, 2009, prepared to argue matters currently pending before the Court, and stands ready to provide any supplemental briefing which the Court may find helpful at that time.

### **III. Conclusion**

The State respectfully asks the Court to deny Defendants' Motion in its entirety. Should the Court desire additional briefing on topics included in Defendants' proposed brief, the State asks for a reasonable time within which to provide that briefing.

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